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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966.

No. 288

O. V. Foy,
Petitioner,

v.

Norfolk and Western Railway Company; Brotherhood of Railroad Trainmen; Brotherhood of Railroad Trainmen, Local Lodge No. 550; John Jennings, Secretary, Local Lodge No. 550, Brotherhood of Railroad Trainmen, and John Cartos, President and Local Chairman, Local Lodge No. 550, Brotherhood of Railroad Trainmen, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1966.

No. ———

O. V. Foy,
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v.

Norfolk and Western Railway Company; Brotherhood of Railroad Trainmen; Brotherhood of Railroad Trainmen Local Lodge No. 550; John Jennings, Secretary, Local Lodge No. 550, Brotherhood of Railroad Trainmen, and John Cartos, President and Local Chairman, Local Lodge No. 550, Brotherhood of Railroad Trainmen, Respondents

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, O. V. Foy, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, decided April 21, 1967, (Appendix A) is not officially reported. The memorandum of the United

States District Court for the Eastern District of Virginia, Norfolk Division, filed March 4, 1966, sustaining the motion to dismiss the original Complaint, is not officially reported. (Appendix C).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3). The date of the judgment sought to be reviewed was entered April 21, 1967. There has been no order respecting a re-hearing, and there has been no order granting an extension of time in which to petition for a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

I. May a Negro railroad employee maintain an action for damages against a labor union and the Railroad for discriminating against him because he is a Negro, preventing him from being promoted to more desirable and higher paying positions during the course of his employment under the Railway Labor Act, 48 Stat 1185, c. 691, 45 U.S.C.A. Section 151, et seq., without first exhausting his administrative remedies?

II. Does the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 411(a)(4) require exhaustion of administrative remedies by a Negro railroad employee seeking damages against a labor union and a Railroad under the Railway Labor Act, 48 Stat 1185, c 691, 45 U.S.C.A. Section 151, et seq?

III. Did the District Court and the Court of Appeals abuse their discretion in refusing to permit the Negro Railroad employee to amend his pleadings pursuant to

Federal Civil Procedure Rule 15(a) by verifying the allegations of the Amended Complaint and filing Affidavits opposing the motion for summary judgment.

STATUTES INVOLVED

The statute involved is the Railway Labor Act, 48 Stat 1185, c. 691, 45 U.S.C.A. Section 151, et seq. The pertinent text of the Railway Labor Act is as follows:

I. 45 U.S.C.A. Section 151, Sixth.

> "The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

45 U.S.C.A. Section 152, First.

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce, or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

45 U.S.C.A. Section 152, Second.

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

45 U.S.C.A. Section 152, Third.

"Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purpose of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

45 U.S.C.A. Section 152, Fourth.

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with, the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or re-

main or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

45 U.S.C.A. Section 152, Sixth.

"In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon: and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; And provided further, That nothing in this

chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

45 U.S.C.A. Section 152, Seventh.

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

45 U.S.C.A. Section 153

First. "There is established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(i) "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

45 U.S.C.A. Section 153, First.

(c) "The national labor organizations, as defined in paragraph (a) of this section, acting each through

the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board."

45 U.S.C.A. Section 153, Second.

"Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189."

II. The pertinent text of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 411(a)(4) is as follows:

"Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) with such or-

ganization, before instituting legal or administrative procedures against such organizations or any officer thereof...."

III. Federal Civil Procedure Rule 15(a) states:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

STATEMENT OF THE CASE

The District Court granted summary judgment for the Labor Union and the Railroad on the ground that the plaintiff had not exhausted his administrative remedies with his Union as to his claim of racial discrimination and refused to permit the plaintiff to file Affidavits in support of his Amended Complaint. The Court of Appeals for the Fourth Circuit affirmed.

The basis for federal jurisdiction in the District Court was paragraph 1 of the Complaint, which was adopted as a part of the Amended Complaint, alleging that jurisdiction is based on the existence of a federal question and

amount in controversy arising under the Railway Labor Act as amended, Title 45 U.S.C.A., Chapter 8, Interstate Commerce Act, Title 49, U.S.C.A., Chapter 1, and the Fifth Amendment to the Constitution of the United States

The Amended Complaint adopted the allegations of the Complaint, which alleged that the plaintiff was a Negro employed in interstate commerce by defendant Norfolk and Western Railway Company as a yard brakeman, at Norfolk, Virginia, having vested seniority rights as a yard brakeman commencing September 7, 1926; that the plaintiff, solely because of his race as a Negro, was excluded by the Norfolk and Western Railway Company from positions of car retarder operator and conductor, and also by the defendant Brotherhood of Railroad Trainmen; that White yard brakemen were designated as promotable yard brakemen, and Negro yard brakemen were arbitrarily classified as non-promotable yard brakemen; that by agreement of March 15, 1952, between the Railway and the Union, seniority of promotable (White) yard brakemen was extended to include positions of car retarder operators, the effect of which was to exclude Negro yard brakemen from the position of car retarder operator; at the time of said agreement, plaintiff was excluded from membership in said Union; that on September 8, 1954, the Railway and the Union amended the agreement to remove therefrom the words "promotable" and "non-promotable" as they applied to yard brakemen, but there has been no change in the discriminatory treatment of the plaintiff by the defendants; that the Railway, subsequent to both agreements, promoted White members with less seniority than the plaintiff as car retarder operator; that the Union had blocked plaintiff's promotion to jobs as conductor and car retarder operator solely because of his race, and had taken

no steps to eliminate discrimination; that in 1955, plaintiff became a member of the Union by reason of the Union having a closed shop contract with the Railway, but the Union had failed and refused to represent plaintiff in good faith and impartially, and discriminated against the plaintiff and other Negro brakemen by creating and enforcing distinction based on race alone; that as of July 1, 1964, fifteen of seventeen yard brakemen shown as having seniority as car retarder operators at Norfolk, have less seniority than the plaintiff as yard brakemen; that the Union had used its Federal statutory position unlawfully to discriminate against the plaintiff as a Negro member to block his promotion to a better paying position, and that said acts were deliberate and malicious and violated the Railway Labor Act and the Fifth Amendment to the Constitution of the United States; that the conduct of the Railway was deliberate and malicious and violated the Railway Labor Act, Section 3(1) of the Interstate Commerce Act, 49 U.S.C.A., and the Fifth Amendment to the Constitution of the United States; that as a result, plaintiff, solely because of his race, was deprived of his right to promotion to positions of car retarder operator and conductor, was denied fair and impartial representation under the Railway Labor Act, and suffered great mental anguish. Plaintiff prayed for judgment against the Union and the Railway for compensatory and punitive damages, attorneys' fees and Court costs.

The Amended Complaint alleged that the plaintiff did not resort to the grievance procedures set forth in the Union's Constitution prior to 1955 because he was excluded from the Union because of his race; that after he became a member of the Union, the reason he did not resort to

the grievance procedures was because he requested the local chairman of the Union to end the discrimination being practiced against him and was told nothing would be done to change the pattern, and because he believed that a claim for damages for racial discrimination was not a grievance of the type contemplated by the Union's Constitution, and that to follow the grievance procedures set forth in the Constitution would be utterly futile; that he did not resort to the administrative remedies provided by the Railway Labor Act and the collective bargaining agreement made by the Union with the Railway, because the National Railway Adjustment Board had no jurisdiction over a dispute between an individual employee and a Union, and that the plaintiff believed that resort to such administrative remedies would be futile; that a further reason that the plaintiff did not resort to the Union's constitutional remedies or administrative remedies was that on February 1, 1956, the Union and the Railway were permanently enjoined by the United States District Judge for the Western District of Virginia from engaging in the discriminatory practices alleged in the Complaint against the Negro employees. The language of the injunction by Judge Paul was listed verbatim and enjoined the Railway and the Union from denying Negro yardmen the right to qualify as car retarder operators on the same terms afforded White members and enjoined the Union and the Railway from carrying on any practices excluding Negro yardmen from promotion as car retarder operators.

REASONS FOR GRANTING THE WRIT

I. *The decision of the Court of Appeals conflicts with the decision of the Supreme Court of the United States in*

Walker v. *Southern R. Co., 385 U.S. 196, 17 L.ed. 2d 294, 87 S. Ct. 367. The decision of the Court of Appeals has decided an important question of federal law, to-wit: The right of a Negro Railroad employee to seek legal redress in the Federal Courts when he has been discriminated against solely because of his race by the Union and the Railroad, and was in conflict with applicable decisions of this Court.*

In *Walker* v. *Southern R. Co.*, 385 U.S. 196, 17 L.ed. 2d 294, 87 S. Ct. 367, the United States District Court for the Western District of North Carolina awarded damages under the Railway Labor Act, 48 Stat 1185, c. 691, 45 U.S.C.A. Section 151, et seq. against a Railroad in favor of a railroad employee for terminating his seniority as a result of which he was not allowed to work. The Court of Appeals for the Fourth Circuit, in 354 F.2d 950, reversed the District Court, and held that the complainant had to first exhaust the grievance procedures provided in the Union Collective Bargaining Agreement, and before the National Railroad Adjustment Board prior to suit, relying on *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 13 L.ed.2d 580, 85 S.Ct. 614. In December, 1966, the Supreme Court reversed the decision of the Court of Appeals for the Fourth Circuit, expressly holding in a per curiam opinion that a discharged railroad employee may sue for damages without first exhausting his administrative remedies, stating that the decisions of the United States Supreme Court holding that there need not be exhaustion of administrative remedies are effective notwithstanding the decision of *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 13 L.ed.2d 580, 85 S.Ct. 614.

The decision in *Walker* v. *Southern R. Co.*, 385 U.S. 196, 17 L.ed.2d 294, 87 S.Ct. 367, controls this case on appeal. In *Steele* v. *L. & N.R. Co.*, 323 U.S. 192, 89 L.ed. 173, 65 S.Ct. 226, the Court held that a Negro railroad employee has no available administrative remedies under the Railway Labor Act, which contemplates resort to the usual judicial remedy of an award of damages for breach of the duty imposed by the statute on a Union representative of a craft to represent the interests of all its members without discrimination against Negroes solely because of their race. The Supreme Court has repeatedly held in a series of cases that the courts have power to protect Negro railroad employees against discrimination because of race. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 89 L.ed. 187, 65 S.Ct. 235; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 96 L.ed. 1283, 72 S.Ct. 1022; *Conley* v. *Gibson*, 355 U.S. 41, 2 L.ed.2d 80, 78 S.Ct. 99. None of the Supreme Court cases dealing with racial discrimination have laid down a requirement that a Negro railroad employee must first exhaust his administrative remedies within the Union before suing for damages under the Railway Labor Act.

II. *The decision of the Court of Appeals construed the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411 (a)(4) as controlling the right of a Negro railroad employee to sue under the Railway Labor Act, 48 Stat 1185, c. 691, 45 U.S.C.A. Section 151, et seq.*

The opinion of the Court of Appeals for the Fourth Circuit cited with approval the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411 (a)(4), and relied upon a number of cases construing said act requiring an exhaustion of intra-union remedies in the absence of some showing that to do so would be futile, or that the remedies are inadequate.

It is submitted that the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411 (a)(4) has no application to an action for damages under the Railway Labor Act, 48 Stat 1185, c. 691, 45 U.S.C.A. Section 151, et seq. The case of *Walker* v. *Southern R. Co.*, 385 U.S. 196, 17 L.ed.2d 294, 87 S.Ct. 367 expressly ruled that the Labor-Management Reporting and Disclosure Act does not apply to an action for damages filed by a discharged railroad employee against the Railroad where the railroad employee had not exhausted his administrative remedies.

The written opinion of the District Court, dated March 4, 1966, relied exclusively on the decision of the Court of Appeals for the Fourth Circuit in *Walker* v. *Southern R. Co.*, 354 F.2d 950, and pointed out that the *Walker* case applied the doctrine of *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 13 L.ed.2d 580, 85 S.Ct. 614, to a railroad employee. The reversal by the Supreme Court of the decision of the Court of Appeals for the Fourth Circuit in the *Walker* case renders the opinion of the District Court without merit.

The long series of cases starting with *Steele* v. *L. & N.R. Co.*, 323 U.S. 192, 89 L.ed. 173, 65 S.Ct. 226 have never alluded to the Labor-Management Reporting and Disclosure Act as in any way controlling an action under the Railway Labor Act by a Negro railroad employee claiming discrimination solely because of his race in his job.

III. *The refusal of the District Court and the Court of Appeals to permit the plaintiff to amend his Amended Complaint by permitting him to file Affidavits and to verify his Amended Complaint conflicts with the decision of this Court in Foman* v. *Davis, 371 U.S. 178, 9 L.ed.2d 222, 83 S.Ct. 227, and Conley* v. *Gibson, 335 U.S. 41, 2 L.ed.2d 80, 78 S.Ct. 99.*

The last paragraph of the judgment order of the District Court noted the exception of plaintiff's counsel to the refusal of the Court to permit plaintiff to file an Affidavit in support of his Amended Complaint. In a footnote, the Court of Appeals mentioned that the plaintiff had moved for leave to file Affidavits in the Court of Appeals. The Affidavit of the plaintiff filed in the Court of Appeals, paragraph 5 thereof, stated that the allegations in his Amended Complaint were true; that the first time he was permitted to take an examination for promotion as a yard conductor was after he had sued in the District Court, and that although he and Bennie Boothe, a Negro switch tender, had seniority over other White brakemen, he was never permitted to take examinations for yard conductor; that he had on numerous occasions complained of discrimination to various officials of the Local Union without any result; that it would have been futile to present and prosecute his grievance with the Local Union as to racial discrimination in employment.

The Affidavit of Bennie Boothe, filed in the Court of Appeals, stated that he had been employed by the Norfolk and Western Railway Company for the past thirty-seven (37) years as a switch tender, was a member of the Negro Race, that he had asked officials of the local Union the reason for the discrimination against the Negro employees without any result, and that it would be futile in view of the attitude of the Union officials to present any grievance to the Local Union in accordance with their rules and regulations.

In *Foman* v. *Davis,* 371 U.S. 178, 9 L.ed. 2d 22, 83 S.Ct. 227, the Court held that it is contrary to the spirit of the Federal Rules of Civil Procedure for a Court to avoid a decision on the merits on the basis of mere technicalities,

that the rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive of the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. The case further holds that leave to amend pleadings under Federal Civil Procedure Rule 15(a) should be freely given and that the outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion, and is merely abuse of discretion and is inconsistent with the Federal Rules. The case quotes from *Conley* v. *Gibson,* 355 U.S. 41, 2 L.ed2d 80, 78 S.Ct. 99, which dealt with racial discrimination involving a railroad employee.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted and that the decision of the Court of Appeals should be reversed, with directions to the District Court to try the case on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,051.

O. V. Foy,
Appellant,

versus

Norfolk and Western Railway Company, a corporation; Brotherhood of Railroad Trainmen, an unincorporated association; Brotherhood of Railroad Trainmen, Local Lodge 550; John Jennings, Secretary, Local Lodge 550, Brotherhood of Railroad Trainmen, and John Cartos, President and Local Chairman, Local Lodge 550, Brotherhood of Railroad Trainmen,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK, WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued March 10, 1967. Decided April 21, 1967.)

Before J. SPENCER BELL and WINTER, Circuit Judges, and HARVEY, District Judge.

Howard I. Legum (Fine, Fine, Legum, Schwan & Fine on brief) for Appellant; and Robert R. MacMillan (Breeden, Howard & MacMillan on brief) for Appellees Brotherhood, and Jos. L. Kelly, Jr., (Williams, Cocke, Worrell & Kelly on brief) for Appellee Norfolk and Western Railway Company.

J. SPENCER BELL, Circuit Judge:

This action was brought by plaintiff, a resident of Virginia, under the Railway Labor Act (45 U.S.C. § 151 et seq.), against his employer, the Norfolk and Western Railway Company, a Virginia corporation, and against his union, the Brotherhood of Railroad Trainmen, and two of its local officials. Plaintiff alleged in his complaint that the defendants had discriminated against him because he is a Negro, thus preventing him from being promoted to more desirable and higher paying positions during the course of his employment. Summary judgment was granted for the defendants on the grounds that plaintiff had failed to exhaust his intra-union, contractual, and administrative remedies without offering any reasons, other than bare allegations for his failure to do so.

Plaintiff Foy had been employed by Norfolk and Western as a yard brakeman since 1926. Since 1957, he had been a member of Local Lodge No. 550 of the Brotherhood. On March 17, 1965, this action was commenced.

The Brotherhood, on April 21, 1965, filed a motion to dismiss the complaint on the ground that the plaintiff was a member of Local Lodge No. 550 and had failed to pursue or exhaust his intra-union remedies by following the grievance procedures provided by the Brotherhood's constitution. The Brotherhood's motion was supported by two affidavits: in

one, the current chairman of the Brotherhood's local grievance committee stated that plaintiff had not followed the grievance procedure; and in the other, the chairman of the Brotherhood's general grievance committee stated that grievances of other Negro members could and had been processed by local lodges and the general grievance committee and had been satisfactorily adjusted in the past. Plaintiff filed no counter-affidavits.

The district court treated the motion as a motion for summary judgment in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, and on March 4, 1966, summary judgment was granted for the Brotherhood and Norfolk and Western. Thereafter, on April 19, 1966, plaintiff was granted leave to file an amended complaint.

The unverified amended complaint alleged that plaintiff had not followed the Brotherhood's grievance procedure before 1955 because he had been excluded from membership because of his race; and that he did not resort to the grievance procedure after admission to the Brotherhood because (1) he had requested the local chairman to take steps to end the discrimination and was told nothing could be done, and (2) his complaint was not a "grievance" of the type contemplated by the Brotherhood's constitution, so that to follow the procedure would have been futile.

The Brotherhood promptly filed a motion to dismiss the amended complaint, which motion was supported by affidavits of all three men who had served as chairman of the local grievance committee since 1955. The affiants stated that the plaintiff had never requested action to end the alleged discrimination, that he had never discussed his grievance with any of them, and that they had not told

plaintiff that nothing could be done. The two affidavits which had been filed with the motion to dismiss the original complaint were also filed with the motion to dismiss the amended complaint.

Norfolk and Western also filed a motion to dismiss the amended complaint on the following grounds: (1) it could not have participated in any violation of the plaintiff's right to fair representation under the Railway Labor Act for the reason that this right had not been violated by the Brotherhood; (2) any violation of contract rights is within the exclusive jurisdiction of the National Railroad Adjustment Board; and (3) plaintiff had not exhausted his contractual remedies under the collective bargaining agreement applicable to his employment. The last ground was substantiated by an affidavit of the general agent and superintendent of Norfolk and Western at Norfolk, Virginia, who stated that plaintiff's first claim to the railroad that he should be considered for promotion was rejected because it was not made within the time provided by the claims rule, but at that time plaintiff was advised that he would be included in the next group of yardmen to be examined for promotion; and that plaintiff was in fact examined with the next group and was subsequently promoted to the position of yard conductor. The affiant further stated that vacancies for the position of car retarder operator, in which plaintiff had also expressed an interest in his complaint, had always been duly advertised and that plaintiff had at no time qualified or attempted to qualify himself for that position in accordance with the terms of the collective bargaining agreement.

On May 27, 1966, the district court gave notice to counsel for all parties that argument on the motions to dismiss the amended complaint would be heard on August 3, 1966. The

defendants' motions and all supporting affidavits had been served on the plaintiff prior to May 27. At no time before the hearing date did plaintiff file any counter-affidavits or other response to the defendants' motions. After oral argument on the motions, treated by the court as motions for summary judgment, had been heard, plaintiff asked leave to file a counter-affidavit. Plaintiff offered no explanation why the affidavit had not been timely filed, nor did he indicate who the affiant would be or what would be the affidavit's nature. The district court denied the plaintiff's motion to file a late affidavit and granted summary judgment for all defendants. We affirm.*

There is, of course, no doubt that the Railway Labor Act imposes upon a union serving as a bargaining agent under the Act an absolute duty to represent all employees fairly and without discrimination. *E.g., Conley* v. *Gibson,* 355 U.S.41(1957). The question now under consideration, however, is whether the district court abused its discretion in requiring the plaintiff first to exhaust his intra-union remedies under the circumstances of this case before bringing his grievance to the courts.

The Labor-Management Reporting and Disclosure Act provides that a labor union cannot limit the right of a member to institute a court action:

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*Plaintiff has moved in this court for leave to file an affidavit justifying his failure to exhaust his intra-union remedies. No authority has been cited in support of this motion, nor has sufficient reason been advanced why plaintiff should be permitted to supplement the record below by filing an affidavit in this court. Even if accepted as a part of the record, the proffered affidavit sets forth no specific facts which would alter our decision in this case. It contains merely a general statement by plaintiff that because of certain conversations with Brotherhood officials in 1957 he "felt" that it was futile to present a grievance to the union in accordance with its rules and regulations.

> "*Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) with such organization, before instituting legal or administrative procedures against such organizations or any officer thereof . . . ." 29 U.S.C. § 411(a) (4) (1964).

The purpose of the proviso is to further development of union democracy; it is not mandatory, however, "but allows the courts in their discretion to determine whether pursuit of such remedies is required." *Simmons* v. *Avisco Local 713, Textile Workers Union of America,* 350 F.2d 1012, 1016 (4 Cir. 1965). See *Betroy* v. *American Guild of Variety Artists,* 286 F.2d 75 (2 Cir.), *cert. denied,* 366 U.S. 929 (1961). Generally, the courts will require an exhaustion of intra-union remedies in the absence of some showing that to do so would be futile or that the remedies are inadequate. *E.g., Thompson* v. *New York Cent. R.R.,* 250 F. Supp. 175 (S.D.N.Y. 1966); *Deluhery* v. *Marine Cooks & Stewards Union,* 211 F. Supp. 529 (S.D. Cal. 1962). See *Farowitz* v *Associated Musicians of Greater New York, Local 802,* 241 F. Supp. 895 (S.D.N.Y. 1965); *Bradley* v. *Local 119, GE-IUS,* 236 F. Supp 724 (E.D. Pa. 1964).

Rule 56(e) of the Federal Rules of Civil Procedure provides:

> ". . . . When a motion for summary judgment is made and supported as provided in this rule [by affidavits depositions, or answers to interrogatories], *an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."*
>
> [Emphasis added.]

Thus, under Rule 56(e), once the Brotherhood had offered its motion, accompanied by affidavits which answered the plaintiff's allegations regarding his reasons for not resorting to his intra-union remedies, plaintiff was required to offer counter-affidavits, depositions or answers to interrogatories sufficient to show the existence of a dispute as to a material fact, or have his bare allegations disregarded. Since plaintiff offered no timely response to the defendants' affidavits, he has, in effect, offered no evidence of any dispute as to the availability of a grievance procedure to correct the wrongs he complained of and no reasons whatsoever for his failure to abide by the grievance procedure of the Brotherhood. In the absence of some explanation for his failure, the district court did not abuse its discretion in granting summary judgment for the defendants.

Neither can we say that the district court abused its discretion by refusing to allow the plaintiff to file a late affidavit after argument on the motion to dismiss the amended complaint had been completed. A review of the sequence of events in this case makes it clear that the plaintiff must have become aware long before the August 3 hearing that in order to proceed to a trial on the merits he would have to submit affidavits or some other response supporting his contention that following the grievance procedure would be futile. Plaintiff had suffered a summary judgment against him after filing his original complaint because of his failure to exhaust his intra-union remedies. After he filed his amended complaint, in which he alleged reasons for his failure to exhaust his intra-union remedies, the defendants filed affidavits completely refuting plaintiff's allegations, thus rendering them totally ineffective under Rule 56(e). Those affidavits were served on plaintiff on May 9, 1966,

and on May 27, his counsel was informed that the hearing date for the defendants' motions would be August 3. During the entire period of this litigation, plaintiff was represented by competent counsel. Yet plaintiff filed no counter-affidavits or other response. The most logical explanation for his failure to do so would seem to be that he in fact could not. When, after the arguments on the motions to dismiss the amended complaint, treated by the court as motions for summary judgment, the plaintiff asked for leave to file a late affidavit, he gave no explanation of why he had failed to file timely affidavits, nor did he offer to reveal to the court the nature of the affidavit or the identity of the affiant. We find no basis for concluding that the district court abused its discretion in denying plaintiff's motion. On the contrary, the district court's handling of the proceedings of this case reveals a conscientious effort to provide the plaintiff with an opportunity fairly to present his case. After the first summary judgment, the court afforded plaintiff leave to amend his original complaint and gave him ample time to prepare a response to the defendants' motions to dismiss the amended complaint and the supporting affidvaits. The District Court for the Eastern District of Virginia is among the busiest in the nation, and it is obvious that the court must necessarily require substantial compliance with the rules of procedure in order best to dispense justice for all.

We need not consider here whether there is any ground for retaining the case against Norfolk and Western independently of the case against the Brotherhood. Plaintiff has nor argued in his brief or during oral argument on appeal that there are grounds for reversing the summary judgment in favor of Norfolk and Western, even if the summary judgment for the Brotherhood is upheld. In fact, plaintiff stated in his brief: "[I]t is important to note that the primary

cause of action . . . asserted by the plaintiff in the case at bar, is *against the Union,* which has breached its duty to represent all the employees in the class fairly." (Emphasis in original.) Therefore, any objection to the district court judgment other that that it was based on the fact that plaintiff had not exhausted his intra-union remedies is deemed waived under the rules of this court.

The judgment of the district court is

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,051.

O. V. Foy,
Appellant,

versus

Norfolk and Western Railway Company, a corporation; Brotherhood of Railroad Trainmen, an unincorporated association; et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

Upon the petition of the appellant, by his counsel, and for cause shown,

It is ordered that the mandate of this Court be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of

certiorari to this Court, provided the application is filed in the said Supreme Court within sixty days from April 21, 1967.

HARRISON L. WINTER
United States Circuit Judge.

Filed May 15, 1967
MAURICE S. DEAN, *Clerk*

A true copy,
Teste:

MAURICE S. DEAN, *Clerk*
U. S. Court of Appeals
for the Fourth Circuit.

By MARGARET L. DAVIS, *Deputy Clerk*

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Civil No. 5005

O. V. FOY,
Plaintiff,

versus

NORFOLK AND WESTERN RAILWAY COMPANY, et al,
Defendants.

MEMORANDUM

Plaintiff has instituted this action against the Norfolk and Western Railway Company, the local and international union known as Brotherhood of Railroad Trainmen, and certain officials of the Local Lodge No. 550. Plaintiff alleges racial discrimination by the defendants in excluding plaintiff from a higher position.

The Railway asserts that plaintiff's claim against it has been waived by reason of his failure to exhaust the administrative remedies prescribed by the collective bargaining agreement made on his behalf. The union, and its

officials, have moved to dismiss the complaint for essentially the same reasons, i.e., the failure of the plaintiff to request the union or its officials to accept and assert his grievance, and that they are now powerless to assert such grievance.

We think that the motion to dismiss and the affirmative defense must be sustained. Technically, the matter is determined on a motion to dismiss converted into a motion for summary judgment.

Since the argument in this case, the United States Court of Appeals for the Fourth Circuit has handed down its opinion in *Walker* v. *Southern Railway Company,* 4 Cir., ——F. (2d)——, decided December 22, 1965. While *Walker* does not involve alleged racial discrimination, the opinion cites with approval the recent case of *Neal* v. *System Board of Adjustment,* 8 Cir., 1965, 348 F. (2d) 722. The *Neal* case is directly in point. Moreover, *Walker* applies the doctrine of *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, to a railroad employee.

Counsel for the plaintiff, by letter dated September 8, 1965, states that plaintiff is prepared to amend his complaint alleging "an adequate reason for failure" to resort to available internal remedies. No formal request to amend has been presented.

On the basis of the record now before the Court the case must be dismissed. Present order.

/s/WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
March 4, 1966

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Civil Action No. 5005

O. V. FOY,
Plaintiff,
versus
NORFOLK AND WESTERN RAILWAY COMPANY, et al,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS

This case came on to be heard on the third day of August, 1966 upon the motions of both defendants to dismiss the plaintiff's action for failure to state a claim upon which relief can be granted against either of said defendants; and affidavits in support of both of said motions having been presented to and not excluded by the Court, said motions are treated as motions for summary judgment.

And it appearing from the pleadings, together with the affidavits of John Cartos dated April 19, 1965 and May 6, 1966, the affidavit of O. L. Brown dated July 10, 1965, the affidavit of G. M. Burnell dated May 5, 1966, and the affidavit of Edward C. McKown dated May 6, 1966, that the plaintiff, O. V. Foy, has wholly failed to comply with, pursue or exhaust the grievance procedures and remedies

prescribed by the Constitution of the Brotherhood of Railroad Trainmen, of which he is a member, as he was required to do in order to bring his claim of discrimination properly to the attention of the said Brotherhood as his collective bargaining representative and in order to invoke his right to representation by said Brotherhood in respect of his said claim and grievance; and the plaintiff having set forth no facts, either by affidavit or otherwise as provided by Rule 56 of the Federal Rules of Civil Procedure, to support his conclusory and unsworn allegation that it would have been futile for him to pursue and exhaust said grievance procedures and remedies, the Court is of opinion that defendants Brotherhood of Railroad Trainmen, Brotherhood of Railroad Trainmen, Local Lodge No. 550, John Jennings and John Cartos are entitled to a judgment as a matter of law.

And it further appearing from the pleadings that the Amended Complaint asserts no claim against the defendant Norfolk and Western Railway Company except a claim that said Railway Company joined or participated in a breach of the statutory duty of equal representation imposed upon plaintiff's collective bargaining representative by the Railway Labor Act, and possibly a further claim that said Railway Company has violated contractual rights conferred upon the plaintiff by the collective bargaining agreement applicable to his employment; and the Court having determined as aforesaid that there has been no breach of said statutory duty in which said Railway Company could have joined or participated; and the Court being of opinion that any claim of the plaintiff against said Railway Company for alleged violation of any contractual right confered upon the plaintiff by his collective bargaining agreement is within the exclusive jurisdiction of the National Railroad Adjustment Board; and inde-

pendently of the foregoing it further appearing from the pleadings and affidavits aforesaid, together with the further affidavit of Harold E. Carter dated May 5, 1966, that the plaintiff has not exhausted the contractual remedies prescribed by and agreed to on his behalf through the collective bargaining agreement applicable to his employment, and the plaintiff having set forth no facts to support his conclusory allegation that recourse to such remedies would have been futile, the Court is therefore of opinion that the defendant Norfolk and Western Railway Company also is entitled to a judgment as a matter of law.

WHEREFORE, it is ORDERED that this action be, and it is hereby, dismissed as to all defendants herein.

To the action of the Court in refusing to permit the plaintiff to file an affidavit in support of his Amended Complaint, said motion having been made by plaintiff's counsel in Chambers on August 3, 1966, when the motion of defendants to dismiss was argued, plaintiff, by counsel duly excepts.

At Norfolk, Virginia, this
——— day of September, 1966.

United States District Judge

Seen:
Of Counsel for the defendants
Brotherhood of Railroad Trainmen,
Brotherhood of Railroad Trainmen,
Local Lodge No. 550, John Jennings
and John Cartos.
Of Counsel for Norfolk and Western
Railway Company
Seen and Objected to:
Of Counsel for the plaintiff,
O. V. Foy